

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

- 1. Shri Ashok Basu, Chairman**
- 2. Shri K.N. Sinha, Member**

Petition No. 88/2003

In the matter of

To declare NTPC Vidyut Vyapar Nigam Limited as “Deemed Licensee” in terms of Section 14 of the Electricity Act, 2003 to undertake inter-state Trading in Electricity.

And in the matter of

NTPC Vidyut Vyapar Nigam Ltd.

.... **Petitioner**

The following were present:

1. Shri M.G. Ramachandran, Advocate, NVVN
2. Shri A.K. Maggu, BGM, NVVN
3. Shri V. Gulati, DGM, NVVN
4. Shri M.S. Chawla, AGM(Comml.), NTPC
5. Shri U.K. Singhal, Sr. Mgr, NVVN
6. Shri S.S. Chakraborty, CEA, NVVN
7. Shri K.V. Balakrishnan, NTPC
8. Shri Arun Mani, NTPC
9. Shri P.C. Viswanathan, NTPC

**ORDER
(DATE OF HEARING: 3.2.2004)**

The petitioner is stated to be a wholly owned subsidiary of NTPC, incorporated on 1.11.2002 under the Companies Act, 1956 with an authorised capital of Rs.10 crore. As per the Memorandum and Articles of Association of the petitioner, one of the main objects to be pursued by it is to undertake the business of sale and purchase of electrical power. According to the petition, the petitioner commenced its trading activities in March 2003. During the financial year 2002-2003, the petitioner is stated to have transacted power for an amount of Rs.3.94 crore.

2. In accordance with Section 12 of the Electricity Act, 2003 (in short “the Act”), no person can undertake, among others, trading in electricity unless he is

authorised to do so by a licence issued under Section 14 or is exempt under Section 13 of the Act by the Appropriate Commission. There are provisos below Section 14 which carve out certain exceptions to the main provision of that section. In the present case, we are concerned with interpretation of the first and fifth provisos, which for the sake of reference are reproduced below along with the main provision:

“14. Grant of licence:

The Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person –

- (a) to transmit electricity as a transmission licensee; or
- (b) to distribute electricity as a distribution licensee; or
- (c) to undertake trading in electricity as an electricity trader,

PROVIDED that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

.....

PROVIDED FURTHER that the Government company or the company referred to in sub-section (2) of Section 131 of this Act and the company or companies created in pursuance of the Acts specified in the schedule shall be deemed to be a licensee under this Act.”

3. According to the petitioner, it is a Government company within the meaning of Section 617 of the Companies Act, 1956, and is, therefore, a “deemed licensee” under fifth proviso to Section 14 of the Act. Accordingly, the petitioner seeks a declaration that as a “deemed licensee”, and therefore, is not required to obtain a licence for undertaking trading in electricity.

4. In the normal course, it was not necessary for us to give a declaration whether or not the petitioner is a “deemed licensee” since there is no *lis* on the issue pending before the Commission. However, in order to avoid a state of uncertainty, we have considered the issue raised by the petitioner.

5. We have heard Shri M.G.Ramachandran, Advocate for the petitioner. According to the learned counsel, as a Government Company, the petitioner is a “deemed licensee” under the fifth proviso to Section 14 of the Act. He further stated that in addition to the fifth proviso, the petitioner is a “deemed licensee” under the first proviso to Section 14 as well, since on the date of commencement of the Act, the petitioner was engaged in the business of supply of electricity as a trader. The learned counsel has drawn our attention to the definition of “supply” given under sub-section (70) of Section 2 of the Act, according to which “supply” in relation to electricity means “the sale of electricity to a licensee or consumer”. The learned counsel submitted that when the Act came into force, the petitioner was already trading in electricity. The petitioner had not urged this as a ground in the petition. However, since it involves interpretation of the provisions of the Act, we will consider this aspect also.

6. Before considering the ambit and scope of the fifth proviso to Section 14 of the Act, it is necessary to consider the provisions of Section 172(a) and 131 (1) and (2) of the Act. According to Section 172(a), a State Electricity Board constituted under the repealed laws shall be deemed to be a State Transmission Utility and a licensee under the provisions of the Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a

licensee in accordance with the provisions of the Act and rules and regulations made thereunder. The proviso to Clause (a) of Section 172 further lays down that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as may be mutually decided by the Central Government and the State Government.

7. According to sub-section (1) of Section 131 of the Act, with effect from the date on which a transfer scheme prepared by the State Government to give effect to the objects and purposes of the Act, is published or such further date as may be stipulated by the State Government, any property, interest in property, rights and liabilities which immediately before that date belonged to the State Electricity Board shall vest in the State Government on such terms as may be agreed between the State Government and the Board. According to sub-section (2), any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee as the case may be.

8. The scheme of the Act thus provides that the State Electricity Board is a licensee from the date of commencement of the Act. The State Government under the Act is required to prepare a transfer scheme to give effect to the objects and

purposes of the Act under which any property, interest in property, rights and liabilities of the State Electricity Board immediately before the effective date shall vest in the State Government. Any property, interest in property, rights and liabilities vested in the State Government as aforesaid shall be further vested by the State Government in a Government Company or any other company or companies. Thus, by reading sub-sections (1) and (2) of Section 131 of the Act, it is envisaged that any property, interest in property, rights and liabilities vested in the State Electricity Board shall ultimately be transferred to a Government Company or a company or companies as may be provided by the State Government in the transfer scheme. Thus, both a Government Company and the other company, are the successor of the State Electricity Board and both are creation of sub-section (2) of Section 131 of the Act. Under the fifth proviso to Section 14, the Government Company or a company referred to in sub-section (2) of Section 131 of the Act are the “deemed licensees” for the purposes of the Act. From the background leading to creation of the Government company or other company under Section 131 (2) of the Act, it becomes crystal clear that the adjectival phrase “referred in sub-section (2) of Section 131 of this Act” qualifies both, “the Government Company” and “the company” since both are envisaged to be created under sub-section (2) of Section 131 of the Act on account of unbundling of the State Electricity Board, which itself is the “deemed licensee” under the Act. On proper interpretation of the fifth proviso, it means that only a Government Company referred to in sub-section (2) of Section 131 of the Act shall be a “deemed licensee” under the Act. Similarly, any other company referred to in sub-section (2) of Section 131 of the Act shall also be a “deemed licensee” under the Act. The companies, whether a Government Company or a private company created as a result of unbundling of the State Electricity Board stand at

the same footing so far as deeming provisions of Section 14 are concerned, because both are the successors of the same “deemed licensee”, the State Electricity Board. When so analysed, in the context of a Government Company, the fifth proviso reads as “a Government Company referred to in sub-section (2) of Section 131 of the Act shall be deemed to be a licensee”. It is not the case of the petitioner that it has been created under sub-section (2) of Section 131 of the Act as a result of unbundling of State Electricity Board. It clearly emerges that the petitioner is subsidiary of NTPC incorporated for a special purpose of undertaking trading in electricity. Therefore, in our opinion, on consideration of the fifth proviso to Section 14 of the Act, the petitioner cannot be said to be a “deemed licensee”. The declaration prayed for by the petitioner, if granted, would lead to manifest absurdity that every Government company, even if not remotely related to electricity sector would be deemed to be a licensee under the Act.

9. We now propose to examine the scope of the first proviso to Section 14. It was argued by learned counsel that under first proviso (reproduced in para 2 of the order above) any person engaged in the business of transmission or supply of electricity, prior to commencement of the Act, shall be deemed to be a licensee under the Act. He submitted that even “deemed licensees” covered under different provisos of Section 14 of the Act shall be within the regulatory jurisdiction of the Commission since the conditions of licence prescribed by the Commission under Section 16 of the Act shall govern such “deemed licensee” and their licences could be revoked or cancelled by the Commission in case of non-compliance of the terms and conditions decided by the Commission. We take this statement with a pinch of salt for the reason that when in the case of “deemed licensees” no

licence has been granted by the Commission, normally the question of its revocation by the Commission should not arise.

10. We have analysed the ingredients of the first proviso. The analysis reveals that a person shall be deemed to be a licensee, if the following conditions are concurrently met, namely:

- (a) The person was engaged in business of transmission or supply of electricity under the repealed laws namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948, and the Electricity Regulatory Commissions Act, 1998
- (b) He was granted a licence, clearance or approval under the repealed laws.
- (c) He shall be deemed to be a licensee for such period as may be stipulated in the licence, clearance or approval granted to him.
- (d) The provisions of the repealed laws shall apply to such licence for a maximum period of one year.
- (e) After expiry of the maximum period of one year, the provisions of the Act shall apply to such business.

11. The petitioner has not brought to our notice any licence or clearance or approval granted to it by any authority to undertake trading in electricity under any of the repealed laws. In fact, there could not be any licence or clearance or approval for undertaking trading in electricity under the repealed laws since prior to commencement of the Act, trading was not recognised as a regulated activity. It is only after commencement of the Act that a licence is needed for undertaking

trading. Therefore, in our opinion, the case of the petitioner does not fall within the ambit and scope of the first proviso either.

12. In view of the foregoing analysis of the first and fifth provisos to Section 14 of the Act, the interpretation placed by the petitioner cannot be countenanced and the declaration sought by the petitioner to the effect that it is a “deemed licensee” does not hold. The petition is accordingly dismissed.

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRMAN

New Delhi dated the 13th February 2004